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8 UNITED STATES DISTRICT COURT
9 WESTERN DISTRICT OF WASHINGTON
AT TACOMA

10 STEVEN CHRISTOPHER KRAFP,

11 Petitioner,

12 v.

13 DEPARTMENT OF CORRECTIONS,

14 Respondent.
15

CASE NO. C11-5692-RBL-JRC

REPORT AND
RECOMMENDATION

NOTED FOR:
FEBRUARY 17, 2012

16 This petition for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2254 has been
17 referred to United States Magistrate Judge J. Richard Creatura pursuant to 28 U.S.C. § 636(b) (1)
18 (A) and (B), and local Magistrate Judge Rules MJR3 and MJR4.

19 Respondent argues that there are three claims in the petition and that one is time barred
20 and the other two are unexhausted (ECF No. 14, page 4 to 9). Respondent asks that the time
21 barred claim be dismissed with prejudice and that the other two claims be dismissed without
22 prejudice so that petitioner may return to state court on those claims if he wishes. The Court
23 believes there are four separate claims. The claim regarding speedy trial is unexhausted, but time
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1 barred. The claim regarding exclusion of evidence of a reprimand of the arresting officer is
2 exhausted, but time barred. The remaining two claims regarding credit for time served are
3 unexhausted, but not time barred.

4 The Court recommends that petitioner be given the option of going forward on his one
5 exhausted claim -- in which case, this petition should be dismissed as time barred. In the
6 alternative, petitioner should be allowed to dismiss this petition on his motion and return to state
7 court. If petitioner fails either to go forward with the one claim or move to dismiss, then the
8 Court should dismiss the claim regarding failure to allow evidence of the arresting officer's prior
9 reprimand as time barred and dismiss the other three claims without prejudice because they are
10 unexhausted.

11 BASIS FOR CUSTODY AND PROCEDURAL HISTORY

12 Petitioner is in custody pursuant to a Peirce County conviction for assault in the third
13 degree (ECF No. 15, Exhibit 1). He was sentenced to 43 months on July 25, 2008. Id.

14 Petitioner, through counsel, filed a notice of appeal on August 1, 2008 (ECF No. 15,
15 Exhibit 3). Petitioner raised the following issues:

16 1. Did the trial court err in denying the defense motion to bring into
evidence Officer Belford's prior reprimand?

17 2. Did the trial court err in convicting Mr. Krapf of third degree assault
18 where there is insufficient evidence that Mr. Krapf was being lawfully detained at
the time of the alleged assault?

19 (ECF No. 15, Exhibit 4 pages 1 and 2). On May 22, 2009, the Washington State Court of
20 Appeals Commissioner affirmed the judgment and sentence (ECF No. 15, Exhibit 2). Petitioner
21 filed a motion to modify the ruling and that motion was denied on August 10, 2009 (ECF No. 15,
22 Exhibits 7 and 8).

1 Petitioner filed a motion for discretionary review with the Washington State Supreme
2 Court on September 23, 2009 (ECF No. 15, Exhibit 9). Petitioner raised the following grounds
3 for relief:

4 1. Did the trial court properly deny the defense motion to admit Officer
5 Belford's prior reprimand into evidence when it was relevant and was
admissible character evidence?

6 2. Did the State adduce sufficient evidence to support the verdict finding
7 defendant guilty of third degree assault?

8 (ECF No. 15, Exhibit 9). The Washington State Supreme Court denied review on February 9,
9 2010 (ECF No. 15, Exhibit 10). At that time, petitioner had the right to seek review in the United
10 States Supreme Court. Petitioner had 90 days from February 9, 2010 or until May 10, 2010, to
11 file a writ seeking certiorari. He chose not to do so within the statutory period.

12 Instead, petitioner filed his federal petition three months late, on August 31, 2011, and he
13 raises the following grounds for review:

- 14 (1) I was not given amendment's [sic] (4 & 8) rights regarding
15 speedy trial rights 157 days awaiting trial. Also officer's record
16 was sealed at trial to not disclose his prior reprimand from police
17 dept. due to suspension due to his involvement with civilian,
18 defendant, ect.
- 19 (2) After serving 29 month prison sentence my probation was revoked
20 under the ESSB 6157 bill and sent back to total confinement to
serve the remaining balance of good-time I earned while in prison.
I was accredited credit for time served by hearings officer on 2-14-
11. However I was denied 45 days credit I served in Pierce Count
(sic) Jail. ??
- 21 (3) Seeking credit I was granted by D.O.C. hearings officer on 2-14-
22 11. But have been denied that time served in Pierce County Jail -
23 upon being revoked from community supervision.

24 (ECF No. 1, pages 8 and 9).

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Petitioner's claims rely on established rules of constitutional law. Further, there are no factual issues that could not have been previously discovered by due diligence. Finally, the facts underlying petitioner's claims are insufficient to establish that no rational fact finder would have found him guilty of the crime. Therefore, this Court concludes that an evidentiary hearing is not necessary to decide this case.

Federal courts may intervene in the state judicial process only to correct wrongs of a constitutional dimension. Engle v. Isaac, 456 U.S. 107 (1983). Section 2254 explicitly states that a federal court may entertain an application for writ of habeas corpus “only on the ground that [the petitioner] is in custody in violation of the constitution or law or treaties of the United States.” 28 U.S.C. § 2254(a) (1995). The Supreme Court has stated many times that federal habeas corpus relief does not lie for mere errors of state law. Estelle v. McGuire,

1 502 U.S. 62 (1991); Lewis v. Jeffers, 497 U.S. 764 (1990); Pulley v. Harris, 465 U.S. 37, 41
2 (1984).

3 A habeas corpus petition shall not be granted with respect to any claim adjudicated on
4 the merits in the state courts unless the adjudication either: (1) resulted in a decision that was
5 contrary to, or involved an unreasonable application of, clearly established federal law, as
6 determined by the Supreme Court; or (2) resulted in a decision that was based on an
7 unreasonable determination of the facts in light of the evidence presented to the state courts.
8 28 U.S.C. §2254(d). Further, a determination of a factual issue by a state court shall be
9 presumed correct, and the applicant has the burden of rebutting the presumption of
10 correctness by clear and convincing evidence. 28 U.S.C. §2254(E)(1).

11 DISCUSSION

12 1. Time Bar.

13 Federal habeas corpus petitions are subject to a statute of limitations under the 1996
14 amendments to 28 U.S.C. § 2244(d), as part of the Antiterrorism and Effective Death Penalty
15 Act (AEDPA). 28 U.S.C. § 2244(d) provides as follows:

16 (1) A 1-year period of limitation shall apply to an application for a writ of habeas
17 corpus by a person in custody pursuant to the judgment of a State court. The
18 limitation period shall run from the latest of-

19 (A) the date on which the judgment became final by conclusion of direct review
20 or the expiration of the time for seeking such review;

21 (B) the date on which the impediment to filing an application created by State
22 action in violation of the constitution or laws of the United States is removed, if the
23 applicant was prevented from filing by such State action;

24 (C) the date on which the factual predicate of the claim or claims presented could
have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or
other collateral review with respect to the pertinent judgment or claim is pending
shall not be counted toward any period of limitation under this subsection.

Pursuant to 28 U.S.C.A. § 2244(d)(1)(A), the limitation period begins on the date on
which the state court judgment became final by the conclusion of direct review or the expiration

1 of the time for seeking such review. Ordinarily, this is when the U.S. Supreme Court disposes of
2 the case on a direct appeal from the person's state court conviction, or, if there has been no
3 application to the Supreme Court for certiorari, 90 days from the final judgment of the highest
4 state court on the direct appeal.

5 The Washington State Supreme Court denied review on February 9, 2010. (ECF No. 15,
6 Exhibit 10). 90 days after this denial, on May 10, 2010, the one-year statute of limitation for a
7 federal habeas filing began to run. It ran uninterrupted until May 10, 2011, when it expired.
8 Thus, grounds for relief one and two are time barred.

9 While equitable tolling is available in some circumstances, petitioner has not shown any
10 of those circumstances apply to this case. The one-year statute of limitations under 28 U.S.C. §
11 2244(d) is subject to equitable tolling "only if extraordinary circumstances beyond a prisoner's
12 control make it impossible to file a petition on time." Miles v. Prunty, 187 F.3d 1104, 1107 (9th
13 Cir. 1999) (*quoting* Calderon v. United States Dist. Court, 163 F.3d 530, 541 (9th Cir. 1998) (en
14 banc)) (other citations omitted). "When external forces, rather than a petitioner's lack of
15 diligence, account for the failure to file a timely claim, equitable tolling of the statute of
16 limitations may be appropriate." Id.

17 The Court concludes that grounds for relief one and two are time barred. The other two
18 grounds for relief which deal with credit for time served and length of sentence are not time
19 barred as they did not accrue until later in time. But neither of these grounds for relief were
20 presented to the state courts.

21 2. Exhaustion and mixed petitions.

22 A state prisoner seeking habeas corpus relief in federal court must exhaust available state
23 relief prior to filing a petition in federal court. As a threshold issue, the court must determine
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1 whether or not petitioner has properly presented the federal habeas claims to the state courts. 28

2 U.S.C. § 2254(b)(1) in part states:

3 (b)(1) An application for a writ of habeas corpus on behalf of a person in custody
4 pursuant to the judgment of a state court shall not be granted unless it appears
5 that:

6 (A) the applicant has exhausted the remedies available in the courts of the state; or

7 (B)(i) there is an absence of available state corrective process; or

8 (ii) circumstances exist that render such process ineffective to protect the rights of
9 the applicant.

10 To exhaust state remedies, petitioner's claims must have been fairly presented to the
11 state's highest court. Picard v. Connor, 404 U.S. 270, 275 (1971); Middleton v. Cupp, 768 F.2d
12 1083, 1086 (9th Cir. 1985) (petitioner "fairly presented" the claim to the state Supreme Court
13 even though the state court did not reach the argument on the merits).

14 Petitioner did not present any claims regarding calculation of credits for time served or
15 credit for time in the Pierce County jail to the state courts. These two claims are unexhausted.
16 Further, petitioner did not present his claim regarding an alleged speedy trial violation in state
17 court and this claim is also unexhausted although it would now be time barred.

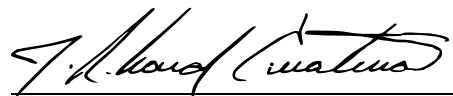
18 This is a mixed petition containing both exhausted and unexhausted claims. Courts
19 cannot consider "mixed" habeas petitions -- that is, petitions containing both exhausted and
20 unexhausted claims. Rose v. Lundy, 455 U.S. 509, 522 (1982). A petitioner who has filed a
21 mixed petition has the choice of amending the petition by deleting the unexhausted claims, or
22 dismissing the petition and pursuing the unexhausted claims in state court. Id. at 510.

23 Dismissal without prejudice of the entire petition is not an option because a federal court
24 cannot dismiss a mixed petition without giving the petitioner the opportunity to either return to
25 state court (dismissal by a motion by the petitioner), or dismissal or amendment of unexhausted
26 claims and proceeding forward on only the exhausted claims. Rose v Lundy, 455 U.S. 509, 510
(1982); Jefferson v. Budge, 419 F.3d 1013, 1015-16 (9th Cir. 2005).

1 The Court recommends that petitioner be given the option of going forward on his one
2 exhausted claim -- in which case, this petition should be dismissed as time barred. In the
3 alternative, petitioner should be allowed to dismiss this petition on his motion and return to state
4 court. If petitioner fails either to go forward with the one claim or move to dismiss, then the
5 Court should dismiss the claim regarding failure to allow evidence of the arresting officer's prior
6 reprimand as time barred and dismiss the other three claims without prejudice because they are
7 unexhausted.

8 Pursuant to 28 U.S.C. § 636(b)(1) and Fed. R. Civ. P. 72(b), the parties shall have
9 fourteen (14) days from service of this Report to file written objections. See also Fed. R. Civ. P.
10 6. Failure to file objections will result in a waiver of those objections for purposes of de novo
11 review by the district judge. See 28 U.S.C. § 636(b)(1)(C). Accommodating the time limit
12 imposed by Fed. R. Civ. P. 72(b), the clerk is directed to set the matter for consideration on
13 February 17, 2012, as noted in the caption.

14 Dated this 23rd day of January, 2012.

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17 J. Richard Creatura
18 United States Magistrate Judge
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